UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/CN.9/SER.C/ABSTRACTS/23
6 July 1999

ENGLISH
ORIGINAL: FRENCH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW

CASE LAW ON UNCITRAL TEXTS
(CLOUT)

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INTRODUCTION

The compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL Secretariat on the Internet (http://www.uncitral.org).

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V.99-85925 (E)

I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 241: CISG 1; 4

France: Court of Cassation (First Civil Division); P 96-19.992

5 January 1999

Thermo King v. Cigna, Dentressangle et al.

Original in French

Published in French: CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/050199.htm

Commented on in French: Leveneur, [1999] Semaine Juridique, Ed. E, 962; [1999] Contrats-Concurrence-Consommation 53.

The First Civil Division of the Court of Cassation set aside the ruling pronounced by the Court of Appeal of Grenoble, as reported in CLOUT Case 204. The Court of Appeal of Grenoble had applied the CISG in the action brought by the French sub-purchaser against the initial seller, an American company, since the latter had issued a contractual guarantee in favour of the end-user.

The Court of Cassation referred to articles 1 and 4 of the Vienna Convention and noted that, in accordance with those provisions, the Convention applied to international contracts for the sale of goods and governed only the rights and obligations of the seller and the buyer arising out of any such contract. By not having established the existence, between the sub-purchaser and the initial seller, of a contract of sale governed by the Convention, the Court of Appeal had failed to observe the above-mentioned provisions.

Case 242: CISG 18; 19; 31

France: Court of Cassation (First Civil Division); J 96-11.984

16 July 1998

S.A. Les Verreries de Saint-Gobain v. Martinswerk GmbH

Original in French

Published in French: [1999] Recueil Dalloz, 8ème Cahier, Jurisprudence, 117; CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/16071998.htm

Commented on in French: Witz, [1999] Recueil Dalloz, 8ème Cahier, Jurisprudence, 117; Ancel et Muir Watt, [1999] Revue critique de droit international privé, 122.

The buyer, a French company, placed successive orders with the seller, a German company, for products to be used in glass manufacturing, which were to be transported from the seller's premises to the buyer's premises by tanker lorry chartered by the buyer. The latter claimed that the goods were defective and sued the seller before the Commercial Court of Orleans.

The Court of Appeal of Orleans held that the lower French court had no jurisdiction, basing its ruling on the provisions of the Brussels Convention of 27 September 1968 (articles 17 and 5 (1)) and on those of the CISG. The Court of Appeal considered that the jurisdiction clause appearing on the buyer's order forms in favour of the

Commercial Court of Orleans should not apply since the order confirmations sent by the seller contained a jurisdiction clause in favour of the courts at that company's principal place of business.

The Court of Cassation did not make any reference to the Brussels Convention (article 17). It cited only articles 18 and 19 CISG and stated that a reply to an offer which purported to be an acceptance but which contained different terms that materially altered the terms of the offer, such as a different stipulation regarding the settlement of disputes, as provided for in article 19 (3), did not amount to acceptance. The jurisdiction clause invoked by the buyer was therefore inapplicable. The Court of Cassation also concurred with the Court of Appeal's ruling in regard to the application of article 5 (1) of the Brussels Convention, namely that the obligation to deliver the sold goods, as defined in article 31 CISG, had been performed by the handing over of the goods to the first carrier and that the obligation forming the basis of the claim had thus been performed in Germany.

Case 243: CISG 25; 64 (1) (a); 74

France: Court of Appeal of Grenoble; RG 98/02700

4 February 1999

SARL Ego Fruits v. La Verja

Original in French

Published in French: CISG-France http://www.jura.uni-sb.de/FB/LS/Witz/040299.htm

The buyer, a French company, ordered 860,000 litres of pure orange juice from the seller, a Spanish company. The contract stipulated that the deliveries were to be staggered from May to December 1996. In return for a price reduction, the parties agreed that the September delivery would take place in late August. At the time of that delivery, the buyer refused the goods. However, in September, the buyer requested that the goods be delivered. Faced with the seller's refusal to deliver, the buyer obtained supplies elsewhere at a higher price and refused to pay for the previous deliveries.

The commercial Court of Romans, before which the case was brought by the Spanish seller, ordered the French company to pay the price of the goods on the ground that the seller was entitled to defer the performance of its obligations on account of the delay on the buyer's part in taking delivery.

The Court of Appeal set aside the ruling. It determined whether the seller was entitled to declare the contract avoided under article 64 (1) (a) CISG. The judges held that the buyer had not committed a fundamental breach, as defined in article 25 CISG, by refusing to take delivery of the goods in late August. The buyer was entitled to regard the bringing forward of the delivery date to late August merely as a reciprocal concession for a financial advantage and could not be expected to have understood that a few days' delay in taking delivery would constitute a fundamental breach on its part. In the absence of any fundamental breach, the seller should have granted the buyer an additional period of time in which to take delivery. The seller's unilateral avoidance thus had to be construed, in the judges' opinion, as wrongful termination of the contract. The judges applied article 74 CISG to calculate the damages awarded to the buyer.

Case 244: CISG 31; 35

France: Court of Appeal of Paris; 97/24418

4 March 1998

Société Laborall v. SA Matis

Original in French

Published in French: CISG-France http://www.jura.uni-sb.de/FB/LS/Witz.040398.htm

Commented on in French: Audit, [1998] Recueil Dalloz, 30ème Cahier, Sommaires Commentés, 279

The buyer, a French manufacturer and distributor of beauty-care equipment and cosmetic products, ordered a machine for manufacturing creams from the seller, an Italian company. A document sent by the seller to the buyer stipulated that delivery would take place ex works, i.e. at the seller's premises. That document did not give rise to any specific observations on the part of the buyer. Since the machine was defective, the seller offered to replace it by a machine of a different type subject to certain financial adjustments. Since this new machine presented identical problems, the buyer sued the seller before the Commercial Court of Paris, seeking an order that the lack of conformity of the equipment be remedied, subject to a penalty for non-compliance, and that damages be awarded.

The seller raised a plea of lack of jurisdiction, claiming that the High Court of Milan was competent. This plea was rejected by the Commercial Court of Paris, which invoked article 5 (1) of the Brussels Convention. In the Court's view, the obligation at issue was a conformity obligation devolving upon the seller, in accordance with article 36 (2) CISG. The Italian company raised an objection, invoking article 35 CISG and maintaining that the obligation regarding conformity was an obligation that was linked to the obligation to deliver the goods, which, in accordance with the agreement between the parties, was to be performed at the seller's place of business.

The Court of Appeal of Paris set aside the ruling. The obligation regarding conformity could not be deemed to be independent of the obligation to deliver, as defined in article 35 CISG, and therefore both types of obligation had to be performed at the same place, which, in the present case, was in Italy.

Case 245: CISG 31 (1) (a); 35

France: Court of Appeal of Paris; 97/25212

18 March 1998

Société Franco-Africaine de distribution textile v. More and More Textilfabrik GmbH

Original in French

Published in French: CISG-France http://www. jura.uni-sb.de/FB/LS/Witz/180398.htm

Commented on in French: Audit, [1998] Recueil Dalloz, 30ème Cahier, 279

The buyer, a French company, ordered a supply of first-grade and second-grade winter clothing from the seller, a German company.

On observing that the delivery included summer garments and accessories that had not been ordered and also certain damaged goods, the buyer sued the seller before the Commercial Court of Montereau, basing its case on articles 31, 50 and 51 CISG and seeking damages to compensate for the commercial and financial loss that it had sustained. The Court declined jurisdiction in favour of the Courts of Munich.

The plaintiff raised an objection, invoking article 5 (1) of the Brussels Convention and maintaining that the due place of delivery of the goods was in France. The defendant referred to article 35 CISG, in accordance with which the obligations regarding delivery and conformity of the goods had to be performed in the same place. In accordance with the intention of the parties, which had made their contract subject to the Incoterm "ex works"

(EXW) and with the provisions of article 31 CISG, that place should be the defendant's principal place of business in Germany.

The Court of Appeal rejected the objection. In order to implement article 5 (1) of the Brussels Convention, it applied the Vienna Convention, noting that the obligation regarding conformity could not be deemed to be independent of the obligation to delivery under article 31 (a) CISG, the conformity obligation at issue had to be performed in Germany.